The statute evidently designs to do away with indirect dealings, and make her rights legal instead of equitable. Passive trusts have been entirely abolished, and where a deed creates them the title passes at once to the beneficiary: 2 C. L. § 2633-4-5. To require a husband (who is not supposed to be under her control or fear) to go through the farce of conveying to some one else, who is at once to pass the property over to his wife, is to keep up a fiction which has not even a legal basis to support it, since the husband has ceased to have possessory claims over her property. He is now in law a stranger to her estate during coverture instead of its possessor and manager; and his consent is not necessary to her disposal of it: *Farr* v. *Sherman*, 11 Mich. Rep. 33; *Watson* v. *Thurber*, 11 Id. 457. Whatever protection she may require when dealing with him, he certainly never was supposed to need any against her.

Believing, as we do, that the basis of the common law disability was in the peculiar disqualifications and burdens of the wife, and that the removal of these removes all the reasons which ever required the intervention of equitable trusts, we think there is now no objection to a deed from husband to wife, which should render it invalid.

The court erred in excluding the deed. The other points become immaterial.

Judgment must be reversed, with costs, and a new trial granted.

CHRISTIANCY and COOLEY, JJ., concurred.

MARTIN, C. J., was not present.

Supreme Court of Pennsylvania.

LEECH v. CALDWELL.

Where two parties to a contract agree to refer any matter of dispute that may arise to a third party, whose decision is to be final, and they waive their right of action at law, they are bound by the decision of such umpire without regard to mistake or fraud on his part.

The remedy for fraud is an action against the guilty agent, not an action on the contract.

The furthest that the rule has been relaxed in Pennsylvania is to allow one party to come into a court of law when the other has refused to join in the choice of arbitrators, or has prevented the chosen umpire from acting as such. Per STRONG, J.

The opinion of the court was delivered by

STRONG, J.—This was an action of covenant brought by Caldwell against Leech, to recover compensation for the graduation, masonry, and other work done on section 43 of the Allegheny Valley Railroad. Leech with others had been contractors for the work of the entire line and Caldwell was a sub-contractor with them for the work on one section.

The articles of agreement fixed very precisely the mode in which alone the sums due from time to time to the sub-contractor should be ascertained. This they did by reference to the estimates that the railroad company had agreed with the primary contractors should be made as the work progressed. And it was stipulated, that on or about the first day of each month during the progress of the work, the estimate made of the quantity and relative value of the work done on the section, by the engineer of the railroad company, should be conclusive between the parties to the agreement, of the amount of said work. And that within ten days after the procurement of a certificate of such estimate from the railroad company, the defendant should pay eighty-five per cent. of the amount of such estimate, agreeably to the contract prices. The agreement then went on to declare, that when all the work should be completed, there should be a final estimate made by the chief or associate engineer, of the quality, character, and value of said work, agreeably to the terms of the agreement, when the balance appearing due to the sub-contractors should be paid upon their giving a release. After some other provisions, the contract concluded with the following clause: "And it is mutually agreed and distinctly understood, that the decision of the chief engineer shall be final and conclusive in any dispute which may arise between the parties to this agreement, relative to or touching the same, and each and every of said parties do hereby waive any right of action, suit or suits, or other remedy in law or otherwise, by virtue of said covenants, so that the decision of said engineer shall, in the nature of an award, be final and conclusive on the rights and claims of said parties."

In view of these covenants, irrespective of the stipulation last

quoted, it is plain the plaintiff can recover for work done by him under the contract, only after estimates made by the engineer of the railroad company. Those estimates it was agreed should determine the quantity of work done, and its *value*, or the sum due to the sub-contractor. It was those that the defendant covenanted to pay, and nothing else. Had no provision been made for an arbitrament, and had there been no waiver of right to sue at law, it was still an essential prerequisite to any action for work done under the contract that estimates of it should be made. It was assumed by both parties that they would be made, and they were. The amounts certified as due in those that were made monthly during the progress of the work the plaintiff received, and gave written acknowledgments of the payments; but he refused to accept the balance appearing to be due by the final estimate, alleging that it was erroneous both in the quantity and in the classification of the work. Doubts were suggested in the argument whether there was in fact a final estimate, such as was called for in the articles of agreement. That there was, seems to us, however, very clear. It is needless to consider the question now. If there was not, it is certain the plaintiff has no such cause of action as he asserts. But, assuming that there was a final estimate, that it was erroneous, and that the covenants of the defendant were broken, the great question of the case remains, whether in view of the last clause in the contract any action at law could be maintained upon it. Provisions similar to this are often introduced into such contracts, and they have more than once been under consideration in this court. Even when much less stringent than the present, they have been held effective to preclude any resort to an action at law. In *The Monongahela Navigation Company* v. *Fenlon*, 4 W. & S. 205, the agreement to submit did not contain any express waiver of the right to sue at law for a breach of the contract. It only declared that in any dispute between the contractor and the company, the decision of the engineer should be obligatory and conclusive without further recourse or appeal. Yet it was held that no action by one party against the other would lie for a breach of the agreement, that the only resort was to the appointed tribunal. To the same effect are *Faunce* v. *Burke & Gonder*, 4 Harris 480, and other cases more recently decided. The doctrine of these cases was apparently acknowledged as a general rule by the learned judge of the court

below, but he applied it with most important and erroneous exceptions. He instructed the jury that the plaintiff could not escape the binding force of the clause in the contract, unless recourse to the tribunal selected was rendered no longer reasonably possible by circumstances over which he had no control, and which he could not prevent by reasonable diligence on his part; that unless a reference was prevented by act of the defendant; or, secondly, by the refusal of the chief engineer to act on proper application made to him; or, thirdly, by such gross and palpable mistake as amounted to fraud; the plaintiff cannot recover. Thus a wide door was opened enabling the plaintiff to escape from the stringent covenant into which he had entered, and by which he had bound himself to waive any right of action, suit or suits, or other remedy at law, and to leave the decision of any dispute that might arise, relative to or touching the agreement, to the final determination of the engineer. So in the answers to the points presented by the defendant below, the same exceptions to the rule laid down in *Navigation Company* v. *Fenlon* were constantly asserted. In this, we are of opinion there was error. It nowhere appears in the case, nor is it alleged, that a reference of any dispute between the parties, to the chief engineer of the railroad company, was prevented by the defendant. If it had been thus prevented, perhaps the plaintiff might have resorted to a court of law, notwithstanding his waiver of such a right. But the plaintiff rests upon the allegations, that the engineers were guilty of fraud, or made gross mistakes in their estimates equivalent to fraud; and that it was impracticable to procure the chief engineer to decide the controversy respecting the accuracy of the estimates after it had arisen. The court recognised these things, if found to have existed, as relieving the plaintiff from his obligation to waive a suit at law. But what had the fraud of the engineers, if any, to do with the plaintiff's covenants? How could the misconduct of the chosen arbitrator deprive the defendants of a right secured to them by the contract—the right of exemption from liability to any suit upon it? If the engineer undertook to act as umpire, and fraudulently injured the plaintiff, he had a remedy by action against the *guilty agent;* but not by suit on the contract. He cannot punish the defendants for a fault of which they are innocent. And how could the mistake of the engineer alter the covenants of the parties? By agreeing to refer to him they took the

risk of his mistakes. They were both interested in having the estimates made as large as possible; and both were injured by an under estimate, if one was made. It was in view of such contingencies as the plaintiff alleges have happened, that the parties renounced their right to any other remedy against each other than the arbitrament of the chief engineer. None of our cases recognise the mistake or fraud of the appointed umpire as sufficient to relieve a party from the necessity of resorting to him exclusively. The farthest limit to which they have gone is, to hold that when one of the parties has refused to join in the choice of arbitrators, or has prevented the chosen umpire from acting as such, the other party may come into a court of law. The case cited from 4 W. & S. 205 does not hold that the fraud or mistake of the engineer in making the estimate, enables the party to withdraw the controversy from his arbitrament. All that was said on this subject is a remark of Judge ROGERS, that it was not pretended the estimate made by the engineer was made in bad faith, or that there was any evidence of gross mistake. He did not say what would have been the effect had there been such evidence. And that was a case where the action was brought against the company whose engineer was the chosen umpire. There is more reason for holding such defendant responsible for the bad faith and mistakes of their own officer, than there is for making these defendants suffer for the fraud or errors of the engineer of the Allegheny Valley Railroad Company, over whom they had no control, and who was an entire stranger to the contract. A reference to the engineer of a railroad company has even been said to be a reference to the company itself: *Ranger* v. *Great Western Railway Company*, 27 Eng. Law & Eq. Rep. 35; and hence it may with some force be argued, that if he is guilty of bad faith, they ought not to be protected by his action. But when parties agree to refer to the engineer of a third person, and to be bound by his umpirage, his fraud or mistake ought not to be permitted to augment the rights of one party to the agreement against the other. We hold, therefore, that the court below erred in the answers given to the defendant's eleventh, twelfth, and fourteenth points. The fraud or mistake of the engineers of the Allegheny Valley Railroad Company, in making the monthly and final estimates, if there was such fraud or mistake, did not release the plaintiff from

his contract, and enable him to bring a suit at law to enforce any covenant of the defendant.

There was error also in the instruction given respecting the impracticability of obtaining a revision of the estimates by the chief engineer. The contract was not that the parties waived any right of action or suit at law only in the event that it might prove reasonably impracticable to obtain a decision of the chief engineer of the railroad company. The possible difficulties of obtaining such a decision were in view of the parties when the contract was made. The engineer has determined the amount due the plaintiff in accordance with the articles of agreement. But the plaintiff alleges that the determination is incorrect. The burden is upon him to show that it is so, and he has but one way in which to show it. That is by the revision of the chief engineer. If he meets with difficulties in obtaining that, or if he cannot obtain it at all, it is his misfortune, not the fault of the defendants; nothing for which they are responsible upon their covenants. The engineer having made an estimate, the question whether it was erroneous or not, was a question between him and the plaintiff. There is, as before remarked, no evidence that the defendants ever interposed any obstacle in the way, of the revision of the estimates by the chief engineer. On the contrary, the proof is that they requested the plaintiff to have a revision made, and requested it at a time when the engineer was at hand and could have made it. No effort was, however, made to obtain such action until about three years after the final estimate was made, when it was manifestly impossible to ascertain the amount of work done in the graduation, or to classify it, if the quantity had been known. Under such circumstances even an unqualified refusal of Mr. Roberts, in the fall of 1858 (if the jury had any evidence that there was such a refusal), to go upon the road and make a measurement of it, did not leave the plaintiff at liberty to sue upon the contract. And there was no evidence from which the jury could find such a refusal. If they found it, as they must have done, they not only found it without evidence, but against evidence, and there was error in submitting the question to them. We hold that there was nothing in the request made to Mr. Roberts, or in his answer, that relieved the plaintiff of his waiver of any right of action on the contract, especially as the request was so long delayed. The delay was not excused by the absence of the engi-

neer. He was indeed away part of the time towards the end of the work, but the proof is that he was there a part of the time during the last year, and there after the work was completed: and no application was made to the railroad company for his presence at any time to revise the estimates, or for the appointment of any other engineer in case of his absence.

It is of prime importance that parties be held to their contracts. If permitted to cut themselves loose from an onerous stipulation, because it may be inconvenient to perform it, there can be no certainty in agreements. The obligation of a covenant is not changed by the fact that it has not worked the results which were anticipated.

There are other assignments of error in this record which we need not notice in detail. What we have said will probably put an end to the case. And the other questions attempted to be raised are therefore of no importance.

Judgment reversed, and a *venire de novo* awarded.

AGNEW, J., dissented.

In the District Court of the United States for the District of Wisconsin.

THE UNITED STATES *v.* THE PROPELLER GOVERNOR CUSHMAN; DWIGHT SCOTT, CLAIMANT.[1]

Under the Act of Congress which provides that no distilled spirits (arrack and sweet cordial excepted) shall be imported into the United States, except in casks or vessels of the capacity of ninety gallons wine measure and upwards, on pain of forfeiture of such spirits and also of the ship or vessel in which the same may have been imported (1 Stat. at Large, p. 701, § 103): *Held*, that where such distilled spirits had been received on board secretly by employees or servants of the vessel, without the knowledge of the captain or clerk, and in violation of a standing rule and positive order, the owners of the vessel would not be liable for their loss, since they formed no part of the cargo to be placed in the manifest, as such; nor would the vessel be subject to forfeiture under the circumstances, though such portion of the spirits as were not allowed by law might be liable to seizure.

The opinion was delivered by

MILLER, District Judge.—This propeller was seized by the collector at the port of Milwaukee, on the 7th day of August 1865.

[1] We are indebted for this case to the courtesy of Hon. A. G. MILLER, District Judge of Wisconsin.—EDS. AM. LAW REG.